CO-OPERATIVE CENTRAL BANK LTD.

v.

G. VISVANATHAN GOVINDASAMY & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING SUMMONS NO. 31-209-84]
6 FEBRUARY 1987

LAND LAW: *Order for sale - Land charged as security for repayment of a loan - Default in repayment - Construction of charge - Whether particular loan granted in pursuance of the charge.*

The applicant, a co-operative society registered under the Co-operative Ordinance 1949 sought in order that certain land charged to it by the respondents alleged to be by way of security for the repayment of a loan of RM600,000 granted to one Mutuerulan s/o Irulandi ("the customer") be sold for the recovery of the amounts due under the charge. The 4th respondent, who alone entered an appearance, averred that the loan of RM600,000 was not granted in pursuance of the charge or on the security of the land. The loan had been granted some eight months prior to the execution of the charge; hence it was alleged that the loan could only have been granted on the personal security and/or arrangement of the customer without the knowledge or consent of the respondents.

Held:

[1] The issue depended upon the construction of the words of the charge. The charge had to be construed reasonably and having regard to the surrounding circumstances.

[2] Having regard to the surrounding circumstances, particularly the contemporary documents, the charge was in the words of Clause 1 thereof to be security "for the repayment on demand of the sum of RM600,000 only ... lent to or advanced for the benefit of (the customer) by the Bank ..." and could not be said to be security for repayment of loans or advances to be made to the customer.

[3] This was confirmed by the conduct of the respondents in that:

(i) they had executed a Letter of Consent consenting jointly and severally to charge the land for the benefit of the customer subject to the terms and conditions of the applicant's Letter of Approval of the customer's loan application, one of which being the execution of a Third Party Charge.

(ii) they had remained passive when they had notice of the lodgment of a caveat over the land by the applicant.

(iii) they had replied to the applicant's Notice of Default pursuant to s. 254 of the National Land Code, saying that arrangements had been made to dispose of the land and promising to take the necessary steps to redeem the loan taken by the customer as soon as the sale was finalised.

[Order made in terms of application. Further orders made fixing date of sale and declaring the amount of principal and interest due and owing under the charge.]

Cases referred to:

Lloyd's v. Harper 16 Ch D 290
Nottingham Hide, Skin and Fat Market Co. v. Bottrill 8 CPC 696

Legislation referred to:
National Land Code 1965, ss. 324(3), 257(1)(b), (c)

For the applicant - Chan Hon Wai; M/s. Daud & Partners
For the respondents - R. Rajasingam; M/s. Rajasingam & Co.

JUDGMENT

Edgar Joseph Jr J:

In this case, the applicant, a Co-operative Society registered under the Co-operative Ordinance 1949, prayed for an order that certain land charged to it by the four respondents by way of security for the repayment of a loan of RM600,000 granted by it on 1 September 1983 to one Mutuerulan s/o Irulandi (the Customer) be sold for the recovery of the amount due under the charge. Only the Fourth respondent had entered an appearance and so the contest was between him and the applicant.

The essential facts were neither in dispute, nor, for that matter, complicated and may be stated shortly thus:

In September 1982, the Customer signed and submitted to the applicant a document entitled "Application Form - Secured/Mortgage Loan" being Exh. "XI-1" annexed to Encl. 13, whereby he sought from the applicant a loan of "RM600,000 for the extension of his then existing business and he offered the said land as security for the repayment of the loan. He had also submitted a valuation report dated 29 September 1982 by Messrs. Tharmalingam & Majid, a firm of Chartered Surveyors and Valuers, a copy whereof being Exh. JC 4 was annexed to Encl. 12, addressed to the Fourth respondent giving their opinion as to the fair market value of the land as being, say RM1,039,000, as at 7 September 1982. In the very first paragraph this report categorically stated that it was prepared upon the instructions of the Fourth respondent - the significance of this will become apparent when I come to consider the objection in Law raised on his behalf during the argument before me.

In reliance upon the Application for Loan, supported by the Valuation Report aforesaid, the applicant approved the same subject to the creation of a Third Party First Legal Charge over the land and informed the Customer accordingly by a letter dated 21 December 1982, a copy where of being Exh. "N 1-4" was annexed to Encl. 13.

On 19 December 1982, the title deeds relating to the land were duly deposited with M/s. Daud and Partners, Advocates and Solicitors of the applicants, to enable them to prepare the Third Party Charge.

Then, the respondents - including, of course, the Fourth respondent - as owners of the land, did on 4 January 1983, execute a Letter of Consent consenting jointly and severally to Charge the same for the benefit of the Customer for a Loan of RM600,000 subject to the terms and conditions contained in the applicant's letter of approval dated 21 December 1982, being Exh. NI-4 annexed to Encl. 13 aforesaid, one of which being the execution of a Third Party Charge over the land.

On 31 December 1982, a sum of RM521,129.76 out of the approved loan of RM600,000 was released by the applicant to the Customer. This was before the execution of the Charge, as it was said that he was in urgent need of the money. He signed a receipt for this, a copy where of being Exh. N1 - was annexed to Encl. 13. However, a further sum of RM78,418.24 was disbursed, upon the Customer's instructions, as follows:

(a) Towards settlement of the balance amount owing in respect of a previous secured loan of RM60,000 taken by the Customer from the applicant. ... RM57,418.24

(b) Towards payment of the processing and service fee in respect of the said loan of RM600,000. ... RM12,100

(c) Towards payment of premium in respect of fire insurance policy in respect of the said property for the period from 31 December 1982 to 31 December 1983... RM1,352

(d) Towards payment of legal fees. ... RM8,000

As the actual legal fees payable was RM7,984.25 the balance sum of RM15.75 was refunded by the applicant to the Customer.

A copy of the Receipt acknowledging receipt of the said sum of RM15.75 by the Customer being Exh. N1-8 was annexed to the same affidavit.

On the same day, the applicant entered a private caveat against the land; it was supported by a Statutory Declaration affirmed by the applicant's solicitor wherein it was stated, *inter alia*, that the applicant, as Chargee under a Charge dated 31 December 1982 over the land had extended a loan of RM600,000 to the Chargors, namely, the respondents herein, for the benefit of the Customer.

I must, at this stage, interpolate to mention that the date of the Charge referred to in the Statutory Declaration was quite incorrect because it was not until 1 September 1983 that the respondents executed it. Be that as it may, the respondents must have thought as little of the point then, as I do of it now, for at no time did they or any of them apply for its removal upon being informed of the same by the Proper Registering Authority acting under the provisions of s. 324(3) of the National Land Code 1965. In any event, the error was of no consequences and could have prejudiced no one; it was also wholly irrelevant to the issues arising upon this Application which I shall consider anon.

Reverting to the chronology of events, the respondents did, on 27 January 1983, execute a Guarantee in writing, being Exh. N1-2 annexed to Encl. 17, wherein it was recited in the opening paragraph that "In consideration of the Bank opening and continuing an account/s with Mutuerulan s/o Irulandi (Borrower's name) (NRIC NO. 1835877) of No. 26 Minden Heights, Road 2, Kuala Lumpur (Borrower's address) (hereinafter called the Principal) or continuing the existing account with the Principal for so long as the Bank may think fit, or otherwise giving credit accommodation or granting time to the Principal either alone or jointly with any other person or persons, we G. Visvanathan s/o Govindaswamy (K.P. NO. 4083854), G.Rajaram s/o Govindasamy, (K.P. NO. 4187163) G. Pasvathi a/p V. Govindasamy @ Pasvathi Ammal a/p Govindasamy (K.P. NO. 2523809) & Jayaram a/l Govindasamy (K.P. NO. 2525321) all of No. 161-C, Argyll Road, Pulau Pinang (Guarantor's address) jointly and severally guarantee on demand in writing being made to me/us, the due payment of all advances and liabilities whether made or incurred before or after the date hereof ..."

As I have already said, they also did, on 1 September 1983, execute the Charge in the statutory form over the land and this was duly registered. The Charge had annexed to it a document entitled "Fixed Loan Charge for Benefit of Customer" duly signed by all the respondents whereby, they expressly agreed, covenanted, declared and undertook with the applicant, *inter alia*, as follows:

(a) The said land is together with the buildings from time to time erected thereon charged to the Bank with repayment on demand of the sum of Dollars Six Hundred Thousand (RM600,000) only (hereinafter referred to as the principal sum) lent to or advanced for the benefit of Mutuerulan s/o Irulandi (K.P. No. 1835877) (herein after referred to as "the Customer") by the Bank together with interest thereon calculated as hereinafter provided and until such demand is made the Customer shall pay the principal sum with interest thereon by monthly instalments of Dollars (60) monthly instalments of Dollars Fifteen Thousand and Sixteen (hereinafter referred to as the said instalments) as such other amount as may be determined in accordance with Clause 3(d) or(6) hereof until the whole of such principal sum with interest shall be fully paid and satisfied provided that the first of such instalment shall commence on the first day of the month following the release of the loan or on such date as shall be stipulated by the Bank by notice in writing and each subsequent instalment thereafter on the first day of every succeeding month." (Clause 1).

In the events which transpired the Customer did make default in payment both of the principal and the interest and the Fourth respondent made payments to the applicant of two sums, to wit, RM15,000 on 5 July 1983 and RM2,600 on 1 August 1983, as evidenced by receipts, photostatic copies whereof were annexed as N1-2 and N1-3 to Encl. 13, clearly acknowledging his obligations under the Charge.

However, there being a breach of the provisions of the Charge by reasons of default being made in the payment of the total principal sum, and interest which, as at 30 November 1983, amounted to RM660,354.65, the applicant through its solicitors, caused to be served upon the respondents a Notice of Default in Form 16D pursuant to the provisions of s. 254 of the National Land Code calling upon them to remedy the breach within one month from such date and warning them that in default thereof, they would make application to Court for an order for sale.

The respondent's response to this was a letter dated 14 October 1983 in the following terms:

> We refer to the AR Registered letter reference VT/M-776/CCB/82/js sent by your solicitors Messrs. Daud & Partners addressed to Mr. Mutuerulan s/o Irulandi and copies of which were sent to us as joint guarantors of the above loan.
>
> We wish to advise you that arrangements have been made to dispose of the above property and we shall take necessary steps to redeem the loan taken by Mr. Mutuerulan as soon as the sale has been finalised.

But the respondents having failed to keep their promise the applicant issued the Originating Summons herein seeking to enforce the Charge.

As I have already noted, only the Fourth respondent entered an appearance.

Before me the Charge was impugned on the ground that the loan of RM600,000 granted by the applicant for the benefit of the customer was never granted in pursuance of it or on the security of the land. In particular, the point was made that although the Charge was executed on 1 September 1983 by the respondents in favour of the applicant, a loan of RM521,129.76 had been granted by the applicant to the customer some eight months previously. Consequently, the Fourth respondent, affirmed in his affidavit dated 2 April 1985, being Encl. 12, that the loan could only have been granted on the personal security and/or arrangement of Mutuerulan s/o Irulandi without the knowledge or consent of the respondents.

In further support of his contention aforesaid, the Fourth respondent pointed out that the Valuation Report from M/s. Tharmalingam & Majid dated 11 April 1985, on the faith of which the applicant had granted the loan, assessed the fair market value as being in the region of RM1,039,321 but, another firm of valuers - M/s. K.T. Appraisers - who, incidentally, were not Chartered Surveyors and Valuers, had in a preliminary valuation report dated 30 March 1985 - and therefore made after the commencement of these proceedings - assessed the fair market value, as at the material time, to be in the region of RM400,000. He accordingly submitted that the loan of RM600,000 could not have been granted on the security of the land which was - so he said - at all material times, worth not more than RM400,000.

It was manifestly clear that the issue which arose for decision in this case depended upon the construction to be placed upon the words of the Charge, the material portions of which I have reproduced above. As in the case of guarantees or indeed any other contract, the Charge must be construed reasonably and having regard to the surrounding circumstances: (per Fry J in *Lloyd's v. Harper* 16 Ch D 290) or, to put it another way, "what would a man of business understand by this charge?" (per Keating J in *Nottingham Hide, Skin and Fat Market Co. v. Bottrill* 8 CPC 696.

I should like to make it clear that before I embarked upon a consideration of the issues aforesaid, I enquired from Counsel on both sides if it was agreed that I could arrive at my decision simply upon the affidavit evidence and without recording oral evidence and they said I could. In any event, neither party had served a notice of intention to cross-examine on the other nor had a summons for leave to cross-examine been taken out. In these circumstances, I was satisfied that I could proceed to a determination of the case upon the affidavit evidence and, of course, the exhibits annexed thereto.

Now, applying the principles enunciated in the two cases cited a above, it seemed clear to me beyond peradventure, that when the parties thereto executed the Chargee they intended, in the words of Clause 1 thereof, that it should be a security "for the repayment on demand of the sum of RM600,000 only (hereinafter referred to as the principal sum) lent to or advanced for the benefit of Mutuerulan s/o Irulandi (K.P. NO. 1835877) (hereinafter referred to as "the Customer") by the Bank together with interest thereon ...". By no stretch of the imagination could it be said, having regard to the surrounding circumstances, most particularly the contemporary documents, that the Charge was only intended as a security for the repayment of loans or advances to be made to the customer. Apart from the actual wording of the Charge, the conduct of the respondents clearly confirms that view; I have already mentioned the execution by them of the Letter of Consent dated 4 January 1983 (Exh., N1-4 annexed to Encl. 13), consenting jointly and severally to charge the land for the benefit of the Customer subject to the terms and conditions contained in the applicant's Letter of Approval dated 21 December 1982, being Exh. N1-4 annexed to Encl. 13, one of which being the execution of a Third Party Charge.

Next, when they had notice of the lodgment by the applicant of the caveat the respondents remained passive and did nothing to remove the same. Not only that, for the respondents' response upon receiving the Notice of Default pursuant to s. 254 of the National Land Code from the applicant's solicitors dated 14 October 1983 was to reply thereto, saying, that arrangements had been made to dispose of the land and promising to take the necessary steps to redeem the loan taken by the Customer as soon as the sale was finalised.

It is a pity that the Fourth respondent has gone back on his promise to pay and taken the unmeritorious objection in Law hereinbefore mentioned because now, not only will the land have to be sold to meet the principal sum lent, but interest thereon will have been steadily mounting up, over the years, not to mention the costs of these proceedings which he will also have to pay.

In the result, I made an order in terms of the application and further orders fixing the date of sale and declaring the amount of principal and interest due and owing by the respondents to the applicant under the Charge in accordance with the requirements of s. 257(1)(b) & (c) of the National Land Code.

Also found at [1987] 1 CLJ 390